United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/868
31 July 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 868

Case No. 961: BEKELE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Ms. Deborah Taylor Ashford, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas, on 7 November 1996, Michael Bekele, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 February 1997, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to order, inter alia:

"(i) [The rescission of] the decision of July 24, 1996, rendered by the ... Secretary-General ...

...

(ii) ... the immediate reinstatement of the Applicant into his functions with all formal and material consequences attached thereto as well as the reimbursement, to the Applicant, of all costs incurred by the latter during the preceding appeal proceedings since the decision of July 22, 1992, taken against him by the Director of the Department of Human Resources and Management.

...

[or, alternatively]

... to pay to the Applicant [his] salary from September 25, 1991 until the date on which the Applicant will have reached the age of ordinary retirement.

...

[or]

(iv) If the Administrative Tribunal was to consider that the Joint Appeals Board ought to have examined the appeal:

Order the return of the matter to the Joint Appeals Board in order for the latter to examine the appeal filed by the Applicant.

..."

Whereas the Respondent filed his answer on 10 February 1998;

Whereas the Applicant filed written observations on 8 May 1998;

Whereas the Applicant filed an annex to his written observations on 14 May 1998;

Whereas, on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered service of the United Nations on 27 January 1969, as Distribution Clerk at the G-1 level, on a short-term contract that was successively extended through 30 June 1972. He was promoted to the G-2 level, on 31 August 1971. On 1 July 1972, he entered the service of UNHCR as a Clerk, at the G-4 level, on a one-year fixed-term appointment which was extended on 1 July 1973, and again, on 1 July 1974. On 6 March 1974, he was promoted to the G-5 level, with effect from 1 November 1973. On 1 July 1975, he was granted an indefinite appointment. On 1 August 1975, he was promoted to the G-6

level, and his title was changed to Senior Clerk. On 1 December 1978, he became Assistant Programme Officer and was promoted to the P-1 level. On 1 November 1979, he was assigned to Luanda, Angola. On 1 December 1980, he became Associate Programme Officer and was promoted to the P-2 level. On 8 December 1982, the Applicant was reassigned to Geneva, to the Central and West Africa Section. On 1 January 1983, his title was changed to Associate Area Desk Officer. On 1 December 1987, he was reassigned, for one year, as Programme Officer in Nairobi, Kenya.

On 27 January 1989, the Applicant received a telex instructing him to return to Geneva by 1 February 1989. The Applicant was authorized to take annual leave from 4 September through 16 October 1989. In a cable dated 17 October 1989, the Applicant sought permission from Personnel Service in Geneva, to extend his annual leave through 10 November 1989, so that he could settle matters relating to his personal effects. On 19 October 1989, the Applicant received authorization to do so. The Applicant did not report to work on 10 November. On 17 November 1989, he requested a further extension of his annual leave through the end of that month. By cable dated 28 November 1989, the Chief, Personnel Administration Section (PAS) granted the Applicant's request but ordered him to report for duty in Geneva by 4 December 1989, at the latest. The Applicant did not do so. On 7 December 1989, the Applicant informed Headquarters that due to a malaria attack, he was unable to report for duty as instructed. He did not respond to the Administration's request for medical confirmation of his illness. On 13 December 1989, the Administration notified the Applicant that, because his absence was unauthorized, he would be considered as having abandoned his post and had, therefore, been separated from service with effect from 4 December 1989.

On 13 August 1990, the Applicant was reinstated on "pure humanitarian grounds" with effect from 4 December 1989. On 22 October 1991, he was placed on special leave with half pay, with effect from 25 September 1991. His absence was considered as certified full sick leave, through 2 December 1990, and he was found to be 50 per cent fit for work starting

3 December 1990.

On 2 October and 20 December 1991, a physician with the Joint Medical Service found that the Applicant continued to be 50 per cent fit for work. On 13 February 1992, the Director, Medical Service, recommended that the Applicant should be granted a disability benefit.

On 9 July 1992, the Chief of the Geneva Office of the United Nations Joint Staff Pension Fund (UNJSPF) informed the Applicant that the UN Staff Pension Committee had determined that he was incapacitated for further service and consequently entitled to a disability benefit under article 33 of the Regulations of the Fund.

On 22 July 1992, the Director, Division of Human Resources Management (DHRM), confirmed to the Applicant that he would be the recipient of a disability benefit and that his permanent appointment would be terminated, in accordance with staff rule 109.3, with effect from 25 September 1991.

On 10 August 1992, the Applicant wrote to the Director, DHRM, contesting the decision that he was incapacitated for further service and requesting that he be given a new assignment. In response, the Chief, PAS, informed the Applicant, by letter dated 31 August 1992, that he should contact the UNJSPF directly if he wished to address matters concerning his disability benefit. On 8 October 1992, the Applicant wrote to the Chief, PAS, to request a new assignment and to contest again the decision to place him on disability.

On 22 December 1992, the Applicant wrote to the High Commissioner (with copies to the Secretary-General, the Legal Counsel and the Director, DHRM), seeking her intervention in the matters of the termination of his appointment and the granting of a disability benefit.

On 5 February 1993, the Applicant requested the Secretary-General to review the administrative decision to terminate his appointment and grant him a disability benefit.

On 14 April 1993, the Chief, Administrative Review Unit, informed the Applicant that his request for review had been received by that office on 13 April 1993. In the absence of a further reply, the Applicant, on 8 July 1993, lodged an appeal with the Joint Appeals Board

(JAB). The JAB adopted its report on 26 June 1996. Its findings, conclusion and recommendation read, in part, as follows:

"...

41. The members of the Panel noted that the Appellant was notified of the termination of his indefinite appointment based on incapacity for further service, by the Director, DHRM, under cover of a letter dated 22 July 1992. The Appellant wrote to the Secretary-General to request the administrative review of the contested decision on 5 February 1993, whereas under staff rule 111.2(a) 'such a letter must be sent within two months from the date the staff member received notification of the decision in writing'. The Panel remarked that the Appellant submitted his request to the Secretary-General with a four and a half months delay.

42. Pursuant to staff rule 111.2(f) and to Article 13 of the Rules of Procedure of the Geneva Joint Appeals Board, the Panel examined the possible existence of 'exceptional circumstances' that could allow a waiver of the prescribed time-limits. The members of the Panel also examined the restrictive definition of 'exceptional circumstances' given by the jurisprudence of the UNAT and the ILOAT, as in cases of ILOAT No. 955, Pineau (1989) and of UNAT No. 372, Kayigamba (1986). The Panel observed that, following the notification of his separation from service, the Appellant wrote to Director, DHRM, to contest the Administration's decision and subsequently sent letters to the UNJSPF and then to the High Commissioner on 22 December 1992. Nevertheless, the majority of the Panel considered that these letters did not constitute 'exceptional circumstances beyond the control of the Appellant' precluding him from writing to the Secretary-General within the prescribed time period.

Conclusion and recommendation

43. The majority of the Panel concluded that the appeal was time-barred and was not able to establish the existence of 'exceptional circumstances' to justify a waiver of the time-limits.

44. Consequently, the majority of the Panel makes no recommendation in support of this appeal."

One member of the Panel dissented, noting that "[the Appellant's] delay could be related to 'exceptional circumstances', beyond the control of the Appellant, as foreseen under

subparagraph (f) of staff rule 111.2."

On 24 July 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the conclusion of the majority of the Panel that your appeal is time-barred and that they were not able to establish the existence of 'exceptional circumstances' to justify a waiver of the time limits. He has also noted that, consequently, they made no recommendation in support of your appeal. He has further noted the dissenting opinion of one Panel member who found that your appeal should be received by the Joint Appeals Board due to the existence of 'exceptional circumstances'.
>
> As the majority opinion found your appeal to be time-barred, the Secretary-General has decided to take no action in respect of your case."

On 28 February 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The appeal should not have been deemed time-barred. The Applicant was never informed of the possibility to appeal against the decisions, to whom to address his appeal, and the time-limit in which his appeal had to be filed. The Applicant was engaged in on-going discussions with the Administration regarding his status, and thus he could not know from what date the time-limit began to run. Furthermore, the Applicant was not in his full state of health until 21 December 1992, according to his medical certificate, and he did request review of the decisions within two months of that date.

2. The Applicant should not have been granted a disability benefit nor separated from service. The UNJSPF did not have accurate medical information about the Applicant when it granted him a disability benefit. The Applicant was found to be 50 per cent fit to work since 1990 and in December 1992 was found to be 100 per cent fit. Thus, he could not

have been found to be totally disabled in July 1992.

Whereas the Respondent's principal contention is:

The Applicant has not proved that there existed sufficient cause to rescind the recommendation of the JAB, accepted by the Secretary-General, that the appeal was time-barred.

The Tribunal, having deliberated from 30 June to 31 July 1998, now pronounces the following judgement:

I. The Applicant's appointment was terminated by letter, dated 22 July 1992, from the Director, Division of Human Resources Management of the Office of the UN High Commissioner for Refugees. There followed a long exchange of correspondence between the Administration and the Applicant, but the termination decision was not rescinded. On 5 February 1993, the Applicant asked for a review of the decision under staff rule 111.2, which requires that a letter must be sent to the Secretary-General "within two months from the date the staff member received notification of the decision." He acted after the two-month period had lapsed following receipt of the letter of 22 July 1992. He received a letter, dated 14 April 1993, from the Chief, Administrative Review Unit, which stated, inter alia, that "the Secretary-General always reserves the right to raise the issue of receivability and competence, as deemed appropriate." The Applicant thereupon appealed to the Joint Appeals Board (JAB) within the time limit prescribed by the Staff Rules after he received this letter, not having received any other response from the Secretary-General. The JAB rejected his appeal on the ground that his request for review by the Secretary-General had been time-barred, the Secretary-General having raised, before the JAB, the objection based on the timeliness of the request for administrative review.

II. Whatever the terminus a quo for the filing of the request for administrative review in this case, the issue that arises is whether there were exceptional circumstances which excused the Applicant from asking in a timely manner for administrative review, circumstances which the JAB should have recognized as warranting a waiver of the time limits and the examination of the Applicant's case on its merits.

III. The JAB may declare an appeal receivable despite the applicant's failure to request review of the contested administrative decision within the two-month time limit. Thus, if the JAB determines that exceptional circumstances prevented an applicant from requesting, within the permitted time limit, review of the administrative decision, it has the discretion to receive the appeal. As the Tribunal stated in Piquilloud (Judgement No. 713 (1995), paragraph I):

> "According to the practice followed by the Secretary-General, in accordance with staff rules 111.2 (a) and 111.2 (b), a waiver of the time-bar in requests for re-examination of administrative decisions contested by staff members of the Organization may be granted in 'exceptional circumstances'. According to the Tribunal's practice, these circumstances are defined in the following manner: 'any circumstances beyond the control of the Appellant which prevented the staff member from submitting a request for review and filing of an appeal in time, may be deemed exceptional circumstances' (cf. Judgement No. 372, Kayigamba (1986))."

In this case, two members of the JAB determined that no exceptional circumstances excused the Applicant from requesting review within the prescribed time limit. One member of the JAB dissented, finding that exceptional circumstances may have prevented the Applicant from reacting in a timely manner to the decision to terminate his appointment and place him on a disability benefit. The dissenting member noted that two exceptional circumstances were present in this case. First, the Applicant was in poor health and "he might not have been in a position to think clearly and decisively to send his contest to the Secretary-General." Second, he did submit a challenge to the decision to the Director, Department of Human Resources

Management on 10 August 1992, to which the Administration responded by letter dated 31 August 1992, that he should address any matters concerning his disability benefits to the UN Joint Staff Pension Fund (UNJSPF). What the Administration failed to do was to advise him that he should, under staff rule 111.2, request a review, by the Secretary-General, of the decision to terminate his employment.

The Tribunal concludes that the Applicant may have been misled by the Administration's instruction to address the matter to the UNJSPF and not informing him that any challenge to the decision had to be addressed to the Secretary-General in accordance with staff rule 111.2(a). These were exceptional circumstances which should have induced the JAB to excuse the Applicant for his untimeliness in filing for administrative review.

This is a sufficient ground for the Tribunal to order the Applicant's case to be remanded to the JAB. The Tribunal does not examine the merits.

IV. For the above reasons, the Tribunal orders that the case be remanded to the JAB for examination on the merits.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Deborah Taylor ASHFORD
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary